Keystone Pretzel Bakery, Inc. *and* Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, CLC, Local 6.[1] Case 4-CA-8746

June 2, 1981

SUPPLEMENTAL DECISION AND ORDER

On May 24, 1979, the National Labor Relations Board issued its Decision and Order[2] in this proceeding in which it adopted Administrative Law Judge Charles W. Schneider's findings that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily withholding a wage increase from employee Hall and violated Section 8(a)(1) by engaging in, encouraging, and authorizing surveillance of employee union activity; creating an impression of surveillance; coercively interrogating employees concerning union activity; otherwise coercively restraining union activity; and by its conduct at a meeting on May 31, 1977,[3] which Respondent paid its employees to attend and at which it solicited and satisfied grievances, promised and subsequently granted wage increases and other benefits, sponsored an unlawful employee poll, and bought lunch for employees. The Board further found that the Union had attained majority status, that the likelihood of erasing the effect of Respondent's unfair labor practices and conducting a fair election was slight, and therefore that a bargaining order should issue.

Thereafter, the Board petitioned the United States Court of Appeals for the Third Circuit for enforcement of its Order. Subsequently, Respondent filed with the court a motion for leave to adduce additional evidence concerning the continued propriety of the bargaining order.[4] On October 8, 1980, in an unpublished order, a two-judge panel of the court remanded the case to the Board for the purpose of adducing additional evidence, noting the lapse of time since the date on which the Union achieved majority status and Respondent's allegation of extensive employee turnover in the unit. On November 14, 1980, the court denied the Board's motion for reconsideration *en banc.*

Thereafter, the Board accepted the court's remand and notified the parties that they could file statements of position concerning the issues raised by the remand. Subsequently, the General Counsel, the Charging Party, and Respondent filed statements of position.

The Board has considered the record as a whole in light of the court's order and the statements of position on remand and now makes the following findings:

As fully set forth in the Board's original Decision, the Union began an organizational campaign among Respondent's employees in April 1977. By May 24, the Union had obtained signatures from 17 of the 29 employees in the unit found appropriate by the Board. On June 1, the Union filed a petition with the Board in which it sought an election among Respondent's employees. On June 16, the Union filed the instant charges. Between the April commencement of the union campaign and the filing of the charges in June, Respondent engaged in a series of unfair labor practices, mentioned above, which the Board found constituted sufficient interference, restraint, and coercion of employee union activity to warrant the issuance of a bargaining order.

In its statement of position, Respondent argues that employee turnover in the bargaining unit and expansion of the bargaining unit since the issuance of the Board's Order have rendered a bargaining order inappropriate. In this regard, Respondent seeks to adduce "up-to-date evidence reflecting the employment status" of bargaining unit employees. Respondent further asserts that it has been prejudiced by delays in the issuance of the Board's Decision and in the filing of an application for enforcement of the Board's Order, and that a majority of employees no longer supports the Union.

The General Counsel and the Charging Party argue that evidence concerning employee turnover following Respondent's unfair labor practices is irrelevant to the issue of whether or not a bargaining order continues to be warranted. Further, they argue that a change in the Board's policy to require consideration of changes in the unit over time would defeat the purposes of the Act by encouraging employers to remain intransigent in the hope that the passage of time and employee turnover would nullify the bargaining obligation. Also, the General Counsel relies on the presumption that new employees support the union in the same num-

[1] The name of the Charging Party has been changed to reflect its merger with the Tobacco Workers International Union, effective August 17, 1978.

[2] 242 NLRB 492 (1979).

[3] Except as otherwise indicated, all dates are in 1977.

[4] Respondent appended to its motion an affidavit of its president in which he listed the persons who were employed by Respondent as of September 5, 1980. A comparison of that list with the record in this case indicates that there are 33 names listed in positions which were included in the unit found appropriate. Of those 33 individuals, 14 were employed in the unit at the time Respondent committed its unfair labor practices, and 7 of those 14 signed cards for the Union. It is this evidence which Respondent sought leave to adduce, arguing that it was relevant to both the Union's continued majority status and the propriety of a bargaining order.

bers as those who left[5] in arguing that mere turnover in the unit is an insufficient reason to modify the Board's bargaining order. The General Counsel and the Charging Party additionally point out that Respondent's unfair labor practices have never been remedied, and contend that the coercive impact of those unfair labor practices continues. The General Counsel also argues that Respondent was not prejudiced by the Board's delay in seeking enforcement because Respondent could have filed its own petition under Section 10(f) of the Act had it desired earlier court review of the Board's Order. Finally, the General Counsel and the Charging Party have indicated their willingness to accept as true Respondent's allegations concerning employee turnover in the unit, but oppose the holding of an additional hearing.

Upon consideration of the parties' statements of position, we have concluded that further hearing is unnecessary. Instead, we shall admit into evidence the affidavit attached to Respondent's motion before the court and accept as true the allegations contained therein.[6] The Board, having accepted the remand of the instant case, respectfully recognizes the court's order as the law of the case in considering whether or not intervening events have vitiated the need for a bargaining order; accordingly, we shall consider whether this evidence warrants modification of the Board's Order.

Respondent's unfair labor practices, as summarized in the Board's original Decision, included conduct which, in the Board's experience, tends to have a continuing effect on employee freedom of choice long after the conduct has ended. Thus, upon learning through an unlawful solicitation of grievances that its failure to give pay raises was a major source of employee discontent, Respondent promptly raised the pay of virtually every unit employee. Such an unprecedented pay raise in the midst of a union campaign has been found to be particularly coercive because it eliminates "the very reason for a union's existence."[7] That effect was further heightened in this case because the pay raise followed—and rewarded—the employees' "vote" in an unlawful poll which revealed that Respondent's unlawful campaign had been so successful that not one employee indicated support for the Union. Thus, the lesson to be learned by Respondent's employees was that the rejection of a union was the means by which to assure the receipt of improved wages and benefits. A corollary to this lesson, which has been recognized by the Board and courts, is that the employees' departure from this preferred antiunion stance may result in the withholding of benefits in the future.[8] Such a lesson, once learned, is not forgotten quickly but continues to exert a restraining influence on employee free choice.

Nothing in the evidence presented by Respondent indicates that the employee turnover since the election has vitiated the effect of these unfair labor practices. Thus, nearly half of the current employees were employed while Respondent was engaged in its campaign of surveillance, interrogation, solicitation, and the implied promise to remedy grievances, and the actual grant of benefits as a reward for their rejection of the Union. Further, all 14 of the current unit employees who were in Respondent's employ at the time of the unfair labor practices received the pay raise which we have found to be unlawful. Thus, a substantial portion of the current employee complement was not only in a position to be aware of Respondent's unlawful actions, but, in fact, was subjected to such unlawful conduct. Finally, Respondent's conduct remains unremedied and at no time has Respondent given assurances to its employees that such conduct will not recur.

We further find that the passage of time from the date of Respondent's unlawful conduct has not rendered a bargaining order inappropriate. Assuming, *arguendo*, that Respondent is correct in alleging that a majority of its employees no longer supports the Union, any current expression of employee sentiment is necessarily tainted by the lingering effect of Respondent's unfair labor practices. In any event, the Board and courts have long held that a union's loss of majority status following the commission of unfair labor practices by an employer sufficient to warrant the issuance of a bargaining order does not require a change in the Board's remedial order, for "a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bar-

[5] In this regard, the General Counsel relies on, *inter alia, Gregory's Inc.*, 242 NLRB 644 (1979), and *Joe Costa Trucking Company; Edjo, Inc., d/b/a Joe Costa Trucking*, 238 NLRB 1516 (1978).

[6] Although Respondent in its statement of position urges the Board to hold a hearing to permit it to adduce "up-to-date evidence reflecting the employment status" of unit employees, we note that it does not assert that substantial further employee turnover has occurred since September 5, 1980. Respondent additionally argues that a hearing should be held to adduce evidence concerning "the present desires of the employees . . . regarding union representation," the representations made by the union card solicitors in obtaining the cards relied on to show majority status, and the correctness of the Board's unit determination which resulted in the exclusion of certain individuals from the bargaining unit. However, Respondent did not previously raise such issues in its motion to the court and these matters are not encompassed within the court's remand.

[7] *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974).

[8] See, e.g., *N.L.R.B. v. Exchange Parts Company*, 375 U.S. 405, 409 (1964). Respondent's willingness to retaliate against employees who supported the Union is exemplified by its action in withholding a wage increase from employee Hall in violation of Sec. 8(a)(3) of the Act.

gain."[9] The delay in the Board's issuance of its Decision and in seeking enforcement of its Order in this case, while regrettable, does not alter our conclusion in this regard. Such delay has in no way diminished the coercive effect of Respondent's serious and extensive unfair labor practices. Further, we find that Respondent has suffered no prejudice from the delay and note that Respondent at all times had the option, which it chose not to exercise, of seeking court review under Section 10(f) of the Act.[10]

In view of the foregoing and the findings in the Board's original Decision, we conclude that neither the passage of time nor employee turnover in the bargaining unit has dissipated the impact of Respondent's unfair labor practices, and therefore that the possibility of erasing the effects of Respondent's unfair labor practices and of ensuring a fair election through the use of traditional remedies remains slight. Accordingly, we adhere to our original conclusion that the employees' sentiment, as expressed through their authorization cards, would be better protected by our issuance of a bargaining order than by traditional remedies. Accordingly, we shall reaffirm the prior Order in this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Order of May 24, 1979 (at 242 NLRB 492), and orders that the Respondent, Keystone Pretzel Bakery, Inc., Lancaster, Pennsylvania, its officers, agents, successors, and assigns, shall take the actions set forth in the said Order.

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[9] *Franks Brothers Company* v. *N.L.R.B.*, 321 U.S. 702, 704 (1944). See also *Hedstrom Co.* v. *N.L.R.B.*, 629 F.2d 305, 321 (3d Cir. 1980), *N.L.R.B.* v. *L. B. Foster Company*, 418 F.2d 1, 4, 5 (9th Cir. 1969), cert. denied 397 U.S. 990 (1970), and *Gibson Products Company of Washington Parish, La., Inc.*, 185 NLRB 362 (1970).

[10] See *N.L.R.B.* v. *Pool Manufacturing Co.*, 339 U.S. 577, 581 (1950), where the Court in similar circumstances stated, "The employer, who could have obtained review of the Board order when it was entered, [Section] 10(f), is hardly in a position to object."